No. 15-420

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL BRYANT, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSOR BARBARA L. CREEL AND THE TRIBAL DEFENDER NETWORK IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The Tribal Defenders Network is a group of tribal advocates, defense attorneys, and federal criminal justice attorneys who defend American Indians in tribal court criminal proceedings, and who collaborate generally with tribal court criminal defense attorneys and advocates. These *amici* are concerned about the rights of defendants who are American Indians appearing in tribal court criminal proceedings, including their due process rights in the tribal court setting and in successive federal court criminal prosecutions.

Professor Barbara L. Creel is an enrolled citizen of a Federally Recognized Indian Tribe, and a former Assistant Federal Public Defender, tribal defender, and state appellate defender. She has practiced in Oregon and New Mexico as an Indian Legal Services Attorney and an Assistant Federal Public Defender. She is a tenured Professor of Law at the University of New Mexico School of Law, and her area of expertise is the intersection of criminal law, Indian law and constitutional law. She teaches courses addressing criminal law and procedure, including Criminal Law in Indian Country. She is the Director of the Southwest Indian Law Clinic, where she supervises law students who represent Indians in tribal court criminal proceedings. She has appeared before

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1. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

numerous tribal courts, including the Hopi Criminal Court, the Pueblo of Tesuque Tribal Court, the Pueblo of Laguna Tribal Court, the Pueblo of Taos Tribal Court, and the Tribal Court of the Confederated Tribes of Warm Springs. She has represented many Indian defendants in federal habeas court review of tribal court proceedings pursuant to under 25 U.S.C. § 1303, and has argued before the Court of Appeals for the Ninth and Tenth Circuits.

Amici are concerned about the civil rights and liberty interests of American Indians in federal court, and the harmful impact denying the right to counsel has on Indian defendants in tribal court proceedings and in subsequent federal court proceedings. Whether disposed of by plea or trial, federal prosecutions that rely on prior tribal court convictions that did not provide Indians with indigent defense counsel gravely jeopardize those Indian defendants' federal constitutional rights to due process of law.

SUMMARY OF ARGUMENT

In our American system of justice, the right to counsel is provided for all defendants when life or liberty is in the balance, regardless of race, ethnicity, nationality, or ability to pay. Fundamental due process and this Court's precedents require that prior convictions must also include this fundamental right when offered as proof in a subsequent prosecution. A prosecutor's reliance on an Indian's prior convictions must be consistent with this guarantee to reflect the nation's constitutional values within the adversarial system.

The new statutory scheme specifically designed to combat domestic violence in Indian country reaffirms tribal criminal jurisdiction over non-Indians, but also guarantees that non-Indians have greater rights to due process and representation by counsel than do Indians charged with the same crimes and facing the same terms of incarceration. Indeed, while non-Indian defendants who will be charged with domestic violence in tribal court are required to have access to the full panoply of rights afforded to defendants outside of tribal courts, Indian defendants may be convicted or led to plead guilty to charges of domestic violence without the benefit of any appointed counsel. Compounding this unequal scheme is the United States' use of these infirm convictions in federal court against the Indian in the name of deference to tribal sovereignty and the federal Indian trust responsibility.

To single out and exclude the Indian defendant from the fundamental protections celebrated by this Court's constitutional jurisprudence is contrary and offensive to our most basic notions of justice. This constitutional injury to Indian people is especially grave in light of the fact that statistically, non-Indians are far more likely to be the perpetrators of violence against Indian women than are other Indians, and this was the primary problem Congress sought to address.

Using uncounseled tribal court convictions in this way also gravely distorts the deference to tribal sovereignty that must be afforded by the United States, and contravenes the federal trust responsibility to tribes and Indian people. Out of respect for tribal sovereignty and the financial challenges tribes face in reclaiming their justice systems in an era of self-determination, Congress

has not yet required tribes to pay for counsel for every indigent defendant. That was one of the concessions made in the Indian Civil Rights Act.

However, to exploit the absence of such a right to counsel in a way that renders Indian people—and *only* Indian people—susceptible to federal prosecution and incarceration without the advantage of counsel, thereby removing them from their families and communities, harms Indians and undermines the collective sovereignty of tribes. Neither the plenary power doctrine nor the federal trust responsibility bestows authority on the United States to do that; and there is no real merit in the position that protecting the safety of Indian women requires exacting such an unfair toll on the constitutional rights of other Indian people. Both the safety and well-being of women and the basic civil rights of all Native people within Indian communities can and must be protected.

Instead of condoning the denigration of Indian civil rights in federal court, this Court has the opportunity in this case to extend the protection for individual rights afforded by the Constitution, so that *all* persons who face incarceration, including in tribal court proceedings, have the right to counsel and full due process. Alternatively, this Court must, at the very least, protect Indian people from the grave disparity presented in this litigation by holding that tribal court convictions of Indians obtained without the right to counsel cannot be used as an element in a federal court prosecution.

ARGUMENT

I. Reliance on Prior Uncounseled Tribal Court Convictions to Prove an Element of the Offense Under 18 U.S.C. § 117 Violates the Due Process Rights of All American Indian Women, Children and Men[2]

A. Constitutional Due Process and the Indian Civil Rights Act

All defendants in federal court prosecutions have the right to appointed counsel when life or liberty is in the balance, regardless of race, ethnicity, or nationality, and the right to prior convictions that are consistent with this principle. Allowing prior uncounseled tribal court convictions to serve as proof of an element of an offense in federal domestic violence prosecutions violates the statutory and constitutional due process rights of American Indians. Whether this Court should allow reliance on such convictions requires consideration of the United States Constitution and its application to American Indians in *federal* court proceedings. While an Indian is not constitutionally protected in a *tribal* criminal prosecution, she *is* protected in a *federal* court prosecution. Although her citizenship is not relevant to trigger the full panoply of constitutional protections, she in fact *is* a United States citizen, and as such, she is entitled to all constitutional protections when charged with any crime in federal court.

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2. Allowing prosecutors to credit prior uncounseled tribal court convictions against Indians will have wide repercussions and potentially impact American Indian women and men in federal court proceedings, as well as juveniles who are also subject to federal court jurisdiction under the Major Crimes Act.

The Constitution establishes the Indian defendant's rights in a federal court prosecution, just as it guarantees these fundamental rights to *all* U.S. citizens. In particular, the Constitution guarantees federal criminal defendants the right to assistance of counsel for their defense. U.S. Const. Amend. VI. Although there is no Sixth Amendment right to counsel in tribal court, see *Talton v. Mayes*, 163 U.S. 376 (1896), constitutional due process and the Indian Civil Rights Act (ICRA) together ensure that Indians and non-Indians alike enjoy the right to due process of law in *both* tribal court *and* federal court. U.S. Const. Amend. V; 25 U.S.C. § 1302 ("No Indian Tribe shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . .").

The United States argues that the absence a right to appointed counsel in *tribal* court proceedings, consistent with the statutory provisions of ICRA, in effect strips Indians of that right in *federal* court prosecutions. Under this view, "valid" convictions under ICRA subject the Indian to a domestic violence prosecution without protections deemed necessary to meet fundamental fairness.

This argument misapprehends both Congress's intent in passing ICRA and the inalienability of the federal constitutional right to counsel that protects Indians and non-Indians alike when charged with federal crimes in federal court. *Amici* urge this Court to reject the United States' argument and protect the due process rights of all American Indians facing prosecution in federal court. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev.

431, 478 (2005) ("If the two primary rights 'missing' from ICRA—free representation for indigent defendants and a jury that includes nonmembers—need to be extended to somehow save the tribal criminal justice scheme, the [federal] courts could interpret ICRA's due process clause to require both.").

B. Fundamental Fairness and the Right to Counsel for All When Facing Incarceration

In a commanding line of cases, this Court has defined the right to counsel as fundamental to justice and fairness and thus inextricably intertwined with due process. While the Constitution guarantees a fair trial through the Due Process Clauses, the basic elements of a fair trial in a criminal proceeding are deployed through access to counsel:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. VI. Thus, a fair trial is one in which evidence, subject to adversarial testing, is presented to an impartial tribunal for resolution of elements or issues defined in advance of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Certain safeguards

are essential to criminal justice, and the right to counsel is the paramount safeguard. *See e.g., Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942).

In federal and state criminal courts, counsel must be provided for all defendants unable to retain counsel when life or liberty is in the balance, regardless of race, ethnicity, or nationality, unless the right is competently and intelligently waived. *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). Counsel's presence is essential because attorneys are the means through which all other rights of a person on trial are secured. *United States v. Cronic*, 466 U.S. 648, 653 (1984).

In an oft-quoted passage, this Court has recognized that without counsel in a criminal matter, the right to be heard would be utterly meaningless:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of

> counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 68-69 (1932). Involvement of competent counsel is so central and basic to justice in our system that an arbitrary denial of counsel is tantamount to "a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id. at 69.* This Court's view in *Powell* of the indispensability of counsel in criminal proceedings took on enormous and lasting meaning.

Shortly after deciding *Powell*, this Court in *Johnson v. Zerbst* described the right to counsel as "necessary to insure fundamental human rights of life and liberty," and the right to counsel guarantee as "one of the essential barriers against arbitrary or unjust deprivation of human rights." 304 U.S. at 462; *see also Smith v. O'Grady*, 312 U.S. 329 (1941); *Avery v. Alabama*, 308 U.S. 444 (1940). *Johnson v. Zerbst* thus directs that the Sixth Amendment not only guarantees the criminal defendant a right to retain counsel in federal court, but requires the government to appoint an attorney for the defendant who cannot afford one in order to protect her when facing a government with the power to take her life or liberty:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done. It embodies a realistic recognition of the

> obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to the humane policy of the modern criminal law which now provides that a defendant if he be poor, may have counsel furnished him by the state, not infrequently more able than the attorney for the state.

304 U.S. at 463.

In *Gideon v. Wainwright*, this Court announced a new constitutional rule, extending the right to court-appointed counsel to state criminal prosecutions for felony charges, an extension this Court characterized as structurally indispensable to a fair trial:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national

> constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

372 U.S. at 344. The appointment of counsel for an indigent criminal defendant is "a fundamental right, essential to a fair trial," and the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires it in federal court. *Id.* at 342-44 (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). *Gideon* thus affirms that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

Nine years after *Gideon*, this Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), extended the right to court-appointed counsel to all persons, including Native Americans, facing the possibility of imprisonment in state or federal court. Following *Argersinger*, no person could be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless she had the assistance of counsel at trial. *See id.* at 37; *Gideon*, 372 U.S. 335. Importantly, the Indian Civil Rights Act was enacted four years *before* this Court's decision in *Argersinger*. Thus, at the time of enactment, ICRA reflected Congress's understanding of the minimum protections required by the Sixth and Fourteenth Amendments in state court proceedings in 1968, prior to *Argersinger*'s mandate. When enacting ICRA, Congress ensured that the right to counsel in tribal court proceedings was synchronous with the protections then required in state court proceedings.

The Sixth Amendment right to counsel serves as a constitutional minimum in all state and federal criminal proceedings that may result in a sentence of actual imprisonment. Tribal courts comprise the only judicial forum in the United States where the constitutional right to counsel does not exist for a United States citizen facing incarceration.[3] The lack of appointed counsel and the imposition of a sentence of actual imprisonment render the Indian defendant's convictions constitutionally invalid. It follows that introduction of uncounseled tribal court convictions in federal court as proof of an essential element of a federal crime violates a defendant's right to counsel and due process. Any evidence of a prior conviction that the Government intends to use to "support guilt or enhance punishment for another offense" in a criminal proceeding must comport with the protections that the United States Constitution affords to *all*—citizens and non-citizens, Indians and non-Indians alike. *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967); *see also id.* at 115 ("The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial. . . .").

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3. Indian Tribes do have to provide counsel at the tribe's expenses when imposing a sentence greater than one year and up to nine years. *See* 25 U.S.C. § 1302(c) (detailing the requirements imposed for enhanced sentencing under the 2010 Tribal Law and Order Act amendments to ICRA).

II. Reliance on Uncounseled Tribal Court Convictions Detrimentally Impacts Only Native American Defendants, Violating Indian People's Constitutional Right to Equal Protection

Because of the uneven legal landscape and woeful jurisdictional gaps, only American Indians show up in federal court with prior uncounseled convictions that do not comport with constitutional due process. This calamity is one created by Congress and this Court's jurisprudence. Under the Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (2006)), federal courts exercise criminal jurisdiction over American Indians, yet significant gaps exist respecting jurisdiction over non-Indians committing serious domestic assault against Indians on the reservation. When Congress passed the Indian Civil Rights Act in 1968, tribes retained their inherent jurisdiction over all criminal offenders, but were limited by ICRA to sentencing authority equivalent to a misdemeanor in state or federal court. *See* 25 U.S.C. §§ 1301–1303. Moreover, in 1978 this Court in *Oliphant v. Suquamish Indian* Tribe, 435 U.S. 191 (1978), divested tribes of any jurisdiction to try and punish non-Indians.[4]

Twelve years later, this Court prohibited tribal criminal jurisdiction over nonmember Indians in *Duro v. Reina*, based on concerns about the civil rights of those citizens. 495 U.S. 676 (1990), *rev'd by statute*, 25

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4. The *Oliphant* decision has been roundly criticized as judicial fiat and as "flatly wrong." Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431, 457 (2005); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §4.02[3][b], at 228-30 (Nell Jessup Newton et al. eds., 2012) [hereinafter "COHEN'S HANDBOOK"] (collecting scholars' criticisms).

U.S.C. § 1301(2)(1990). Congress acted swiftly to overrule *Duro*, enacting a statute that "recognized and affirmed" inherent tribal criminal jurisdiction over all Indians. 25 U.S.C. § 1301(2)(1990). Although Congress moved quickly to implement the "*Duro* fix," it did not attempt to address the gap in jurisdiction over non-Indians left by *Oliphant*. Consequently, tribes were left with limited inherent criminal jurisdiction over their own Indian membership as well as members of other tribes; but a jurisdictional void remained in which non-Indians were totally immune from tribal court prosecution. That immunity marred the jurisdictional landscape until Congress acted in 2013 to restore tribal jurisdiction over non-Indians—but only in domestic violence cases, and contingent on tribes' providing certain protections comparable to rights guaranteed by the United States Constitution. *See* Violence Against Women Act 2013, 127 Stat. 120-23, § 904 (codified at 25 U.S.C. § 1304).

Section 904 of the 2013 Act—the Violence Against Women Act Reauthorization, Pub. L. No. 113-4, 127 Stat. 54 (codified throughout the United States Code) [hereinafter "VAWA 2013]—contains the Indian country provisions which allow tribal prosecution of non-Indians accused of dating violence and domestic abuse. VAWA 2013 represents the first congressional response addressing this Court's denial of tribal court jurisdiction in *Oliphant*. VAWA 2013 recognizes and affirms "special domestic violence criminal jurisdiction" over non-Indians, as part of the inherent jurisdiction of Indian tribes defined in the Indian Civil Rights Act. 25 U.S.C. § 1304(b)(1). Because of VAWA 2013, tribal courts exercising this inherent power have jurisdiction over non-Indian defendants for acts of domestic violence or dating violence that occur in the Indian country of the tribe, but with certain proscriptions.

See 25 U.S.C. § 1304 ("Tribal Jurisdiction Over Domestic Violence").

And herein lies the problem.

Tribes that exercise section 904 jurisdiction must provide non- Indian defendants with the full panoply of constitutional rights as established by the U.S. Constitution and interpreted by this Court, in addition to the ICRA statutory rights. *See* 25 U.S.C. § 1304(d)(1)-(4). Specifically, tribes must provide: (1) "all applicable individual rights guaranteed under [ICRA]"; (2) the right to counsel; (2) an impartial jury which "reflects a fair cross section of the community" and does not "systematically exclude" non-Indians; (3) "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm inherent power [of tribal courts] . . . to exercise" this jurisdiction; and (4) for offenses punishable by imprisonment, all rights described in 25 U.S.C. § 1302(c).

Accordingly, Indian tribes can only prosecute other Indians, and under ICRA, Indians do not have the right to indigent defense counsel. The only exception is the handful of tribes that are exercising the special domestic violence criminal jurisdiction over non-Indians authorized by VAWA 2013, which requires the full panoply of U.S. Constitutional rights. The result is that Indians do not have the right to indigent defense counsel in tribal court,[5] but non-Indians do.[6]

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5. Indians only have the right to indigent defense when facing a sentence longer than a year. *See* 25 U.S.C. § 1304.

6. This is especially troubling given the statistics regarding the number of non-Indians perpetrating violence against Indian women.

Tribal court defendants routinely receive and serve sentences of incarceration without counsel. *See, e.g., United States v. Kirkaldie*, 21 F. Supp. 3d 1100, 1108-09 (D. Mont. 2014) (observing that Indian defendant "served a sentence of actual imprisonment in the tribal court" and that the "Government concedes that [defendant] failed to receive appointed counsel in tribal court"); *Romero v. Goodrich*, 480 F.App'x 489 (10th Cir. 2012) (challenging an underlying tribal court order of imprisonment for eight years without counsel). Thus, in a subsequent federal prosecution, only a Native American defendant will have suffered a prior conviction that would have violated the Constitution and transgressed access to justice principles applicable in federal court. With respect to Respondent Bryant, and in most tribal court convictions, the usual justifications for properly crediting an uncounseled conviction—such as the sentence having consisted of a fine only, or an intelligent waiver having been obtained, or the defendant's ability to afford counsel—do not apply. In fact, in *Amici*'s experience defendants in tribal court routinely plead guilty to minor offenses and receive sentences of incarceration without nderstanding their

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See Ronet Bachman et al., U.S. Dep't of Justice, Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known 141 (2008), *available at*: https:// www.ncjrs. gov/pdffiles1/nij/grants/223691.pdf. ("Victimizations against American Indian and Alaska Native women were more likely to interracial. That is, a larger percent of victimizations against American Indian and Alaska Native women are committed by white offenders compared to American Indian and Alaska Native offenders.") *see also Id.* at 38, Table 9. In addition, the report noted that 60% of Alaska Native and American Indian women resided off tribal lands in urban areas. *Id.* at 6, 17.

rights or the collateral consequences of a conviction with jail time imposed.[7] Nor is there merit in the argument

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7. *See* Statement of Neil Fulton, Chief Federal Public Defender for the Districts of North and South Dakota Before the Senate Judiciary Committee on Protecting the Constitutional Rights to Counsel of Indigents Charged with Misdemeanors, May 13, 2015. Mr. Fuller testified:

"Entering guilty pleas to get out of tribal custody is a disturbing and recurring reality that encounter. Many tribes do not provide counsel and many that allow counsel permit lay advocates rather than law trained ones. When a defendant requests counsel, they often face the reality that due to case backlogs, the lack of readily available counsel given sparse populations, and other practical impediments they will remain in jail longer to obtain counsel and fight a charge than if they simply pleaded guilty and got a sentence of time served. In my experience that is common. In fact, I have spoken with advocates who have dealt with the conflict of advising clients who may want to assert their innocence and use counsel, but would face extended detention to do so and simply plead guilty as a result of not understanding how those admissions may be harmful in the future.

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"I also frequently see prosecution for domestic assault by an habitual offender under 18 U.S.C. Section 117 based on tribal misdemeanor assault convictions that are obtained without counsel. While there are clearly many instances of real and troubling domestic abuse in Indian Country and elsewhere, there are also many instances where conduct that would more accurately be described as public intoxication or disorderly conduct results in a guilty plea to domestic violence in tribal court without counsel. Later, those uncounseled tribal court convictions provide the foundation for federal prosecution and enhanced penalties."

Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the Senate Comm. On the Judiciary, 114th Cong. (2015)(statement of Neil Fulton, Chief

that Congress's intent to accommodate tribal sovereignty by not requiring defense counsel at the tribe's expense licenses disregard or suspension of the Constitution's protections when the Indian defendant is haled into *federal* court. Although this Court has held that the Constitution's due process safeguards against governmental power do not apply of their own force to tribal governments, *Talton v. Mayes*, 163 U.S. 376 (1896), the power of the *federal* government is not likewise exempt and remains constitutionally limited. This Court must not sanction the racially offensive notion that the Constitution does not fully protect a criminal defendant in federal court when she happens to be an Indian whose tribal enrollment status had allowed her to be convicted previously in tribal court without benefit of counsel.

While it is true that the Sixth Amendment does not operate to require counsel in tribal court, it does not follow that convictions secured without counsel and adequate civil rights protections are sovereign tribal decisions to be credited in federal court at the expense of the individual Indian defendant. There are myriad reasons for a tribe's decision not to provide law-trained counsel in tribal court proceedings, including the all-too-common lack of financial resources, training, and personnel to support a tribal public defense system on an impoverished Indian reservation. Those reasons do not alter the fact (or soften the harsh reality) that the prior convictions were secured without protections this Court repeatedly has deemed

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Federal Public Defender for the Districts of North and South Dakota), available at http://www.judiciary.senate.gov/meetings/protecting-the-constitutional-right-to-counsel-for-indigents-charged-with-misdemeanors.

necessary to provide basic fairness in federal court proceedings. There are also myriad reasons that a tribal judge would routinely impose a jail sentence for minor offenses on the reservation, including lack of alternatives to incarceration, recidivism and probation violations for substance abuse, and limited access to treat substance abuse on the reservation.

Even assuming that congressional plenary power over Indian tribes allows Congress to create a federal offense aimed at combatting domestic violence in Indian country, crediting a prior uncounseled conviction to make it easier for the prosecutor to convict the Indian does not fall within that power. In determining whether Congress intended to permit prior *uncounseled* convictions to serve as proof of the element of the domestic violence statute, this Court's longstanding interpretive canons of construction in both Indian law and criminal law weigh heavily in favor of retaining protection of the individual Indian and her constitutional rights in federal court. *See, e.g.*, COHEN'S HANDBOOK §2.02, *supra*, at 113-23 (discussing Indian law canons). The broader, long-term danger posed by this case, of course, is that if Congress can diminish the civil rights of an Indian individual in federal court for the sole purpose of making it easier to convict, it can do so for other citizens as well.[8]

The use of prior uncounseled convictions to combat domestic violence in federal court creates an untenable

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8. "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall in our democratic faith." Felix S. Cohen, *The Erosion of Indian Rights, 1950-53*, 62 Yale L.J. 348, 390 (1953).

and unconscionable equal protection problem for Native Americans, whose unique racial/political status targets them as the only class of United States citizens who face prosecution with priors that were secured without the fundamental fairness equated with the right to counsel.[9] Domestic violence is a plague that threatens all families and has a documented toll on Indians in Indian country. The United States has taken the position that suspending an Indian defendant's constitutionally protected rights in federal court is the only way to address domestic violence problems in Indian country. As interpreted by the United States in this case, Section 117(a) deprives a certain class of citizens—based on their race, ethnic origin, and political status—of those citizens' constitutional right to have counsel appointed to defend themselves against charges of criminal wrongdoing. The Government's effort to evade the Constitution's equal protection guarantee by arguing that tribal status constitutes a political rather than racial distinction must be rejected in the context of criminal prosecutions in federal court. The Constitution is equally available to *all* U.S. citizens—American Indians included—to defend themselves against the immense prosecutorial power of the Federal Government.

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9. This Court has held that classifications based on status as a member of a recognized Indian tribe do not violate the Equal Protection Clause. *United States v. Antelope*, 430 U.S. 641, 644–47 (1977). However, *Antelope* specifically left open the question of whether "instances in which Indians tried in federal court are subjected to differing penalties and burdens of proof from those applicable to non-Indians charged with the same offense" would violate the Equal Protection Clause. *Id.* at 649 n. 11. Such a scenario is present here.

CONCLUSION

For the reasons set forth above, amici urge this Court to affirm the decision Ninth Circuit Court of Appeals.

Respectfully submitted,

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March 14, 2016

APPENDIX

APPENDIX — STATEMENTS OF I NTERESTS OF PARTICULAR AMICI CURIAE*

The following join as Sponsors of the Brief of Barbara Creel and the Tribal Defender Network as *Amici Curiae* in Support of Respondent:*

ANDREA SEIELSTAD

Professor Andrea M. Seielstad has 25 years of experience representing individuals in tribal court proceedings, as well as in state, federal and administrative courts of Ohio and New Mexico. She began her legal career as a staff attorney at DNA – People's Legal Services, Inc., in Crownpoint, New Mexico, providing public defender services for adults and juveniles charged with crimes by the Navajo Nation and representing individuals in a variety of civil proceedings. She has represented Native Americans in habeas actions in tribal and state court and collaborated in the representation of Indian defendants in federal habeas court review of tribal court orders pursuant to 25 U.S. C 1303. She is a tenured professor at the University of Dayton School of Law, where she teaches in and directs the school's clinical program and teaches civil procedure, civil rights enforcement, and dispute resolution. She also teaches and supervises students periodically in the University of New Mexico's Southwest Indian Law Clinic and has taught as a visiting professor in a clinical program that acted as the public defender of the Nez Perce Tribal Court at the University of Idaho School of Law. She is licensed to practice in Ohio, New Mexico, the Bishop Paiute Tribal Court, and has practiced before the Navajo Nation courts.

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* Titles and affiliations are for identification purposes only.

Appendix

Professor Seielstad is committed to protecting the civil and human rights of American Indians as well as in promoting tribal sovereignty. Based on her experience representing individuals in tribal, state, and federal court, she has experienced first-hand the importance of counsel in advising individuals about the consequences of their pleas in and outside of tribal justice systems and in securing due process and other fundamental rights.

KATHLEEN BOWMAN

Kathleen Bowman is the Director Office of Navajo Public Defender Office, a position she has held since the office was established in 1999. She manages and supervises the criminal defense services at the Window Rock office and three district offices within the Navajo Nation. As the Tribal Public Defender, she represents the defense bar in drafting and revising the Navajo Nation code – including the Children's Code, Family Violence and Protection Act, Vulnerable Adult Protection Act, Extradition Statutes, Sex Offender Registration and Notification Act, Title 17 Criminal Statutes – providing a voice and critique that is crucial to ensuring due process rights and fundamental rights are protected. She is a dedicated advocate for justice and fairness in criminal proceedings, and has spoken out on pre-trial detention abuses that cause uncounseled pleas. http://www.navajotimes.com/politics/lawcourts/2010/0410/042910defendants.php

Ms. Bowman is a member of the Tribal Defender Network.

Appendix

ELLEN PITCHER

Ellen C. Pitcher served as an Assistant Federal Public Defender in the District of Oregon for 24 years, where she was a Senior Litigator for the last decade of her service. She has represented dozens of tribal members charged with offenses in Indian Country, including murder, manslaughter, felony assault, sexual offenses and firearms charges. In this capacity, she traveled to a number of reservation lands, observed tribal court proceedings and met with tribal prosecutors, probation officers, legal aid personnel and law enforcement. Prior to her federal service, she headed criminal law practice in Hood River and Wasco counties along the Columbia River in Oregon, where she represented tribal members in state criminal proceedings. Her interest in tribal legal issues extends beyond individual cases, and she has traveled to the Confederal Tribes of the Warm Springs Indian Reservation to meet with tribal council members, provide general legal information to the local newspaper, the *Spilyay Tymoo*, and mentor the tribal advocates and legal aid attorneys representing tribal members in tribal court.

Ms. Pitcher's path to the legal profession began with her advocacy for women's rights in the 1970's, and she remains committed to the fight for women's civil rights, including their safety from domestic violence, both in Indian County and elsewhere. Her concern for tribal members includes protection of individual tribal members' fundamental constitutional rights in tribal court and in subsequent proceedings in state and federal court.

Appendix

KRISTY BARRETT

Kristy Barrett is the former Executive Director of the Native American Program of Legal Aid Society of Oregon, an organization she worked with for over 16 years, before becoming the Executive Director of Sage Legal Center, a nonprofit law firm dedicated to Indian juvenile justice. At the Native American Program, she managed a Department of Justice criminal defense contract and supervised a tribal court criminal defense services on the Warm Springs Indian Reservation and provided defense training and services to coordinated to address the gap in justice for tribal people under the Indian Civil Rights Act. The tribal public defense cases provided numerous opportunities to view the necessity of counsel and the degradation of Indian rights without it.

OFFICE OF THE TRIBAL PUBLIC DEFENDER
COLVILLE CONFEDERATED TRIBES

The Office of the Tribal Public Defender for the Colville Confederated Tribes is one of the few dedicated criminal defense offices in Indian Country. Neither the Indian Civil Rights Act nor the Colville Civil Rights Act require the tribes to pay for members to be represented, however the Colville Business Council has chosen to do so to better serve the membership. Pursuant to the tribal code, public defenders and advocates represent members in criminal cases in which defendants are facing jail. Certain Colville public defenders and advocates are members of the Tribal Defense Network.

Appendix

REINA ESTIMO

Reina Estimo is a member of the Confederated Tribes of Warm Springs, a federally recognized Indian Tribe in Oregon, and a former Tribal Public Defense Lay Advocate with the Tribes. In her position, Ms. Estimo has provided criminal defense services to hundreds of Warm Springs Tribal members in tribal court. She is concerned with the due process rights of all Indians in tribal, state and federal court proceeding, including the direct and collateral consequences of a tribal court conviction. She has witnessed the harsh reality of crime and punishment in Indian Country where indigent Indian defendants, tribal members and non-members – men, women and children – were incarcerated in the reservation jail for up to year or more without any representation. Many Indians entered a guilty plea without any legal advice from counsel or an advocate, or even information on the nature of the charges and evidence, because of the inability to post any bail on pending charges. Without the possibility of bail, defendants plead guilty to expedite the process to begin a serving sentence rather than wait several weeks or months in pre-trial detention. She has also witnessed non-member Indians plead without any advice because they are unable to retain counsel and were not entitled to the tribal defender services. Ms. Estimo was a member of the Tribal Defender Network.

JOHN P. LAVELLE

Professor LaVelle has been teaching and writing in the field of Indian law for 22 years. He is an enrolled member

of the Santee Sioux Nation and an Associate Justice of the Santee Sioux Nation Supreme Court. He served as a member of the board of authors and executive editors for the 2005 and 2012 editions of *Cohen's Handbook of Federal Indian Law*, the field's comprehensive treatise. He is a Dickason Professor Law at the University of New Mexico School of Law in Albuquerque, where he teaches courses in the Law and Indigenous Peoples Program.